IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 843 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYENDRASINH UDAYSINH VAGHELA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR AD SHAH for Appellant(s) : 1,
Mr.R.C.Kodekar, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 17/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. The learned Additional Sessions Judge, Nadiad delivered the judgment in Sessions Case No.13 of 1997 on 2.8.1997, wherein the present appellant was convicted under Section 302 of the Indian Penal Code and awarded life imprisonment and also fine of Rs.1,000/-, i/d simple imprisonment for three months. He was also convicted under Section 498(A) of the Indian Penal Code and awarded rigorous imprisonment for two years and fine of Rs.500/-, i/d simple imprisonment for two months. The accused nos.2 and 3 have been acquitted from the above referred offences. Being aggrieved and dissatisfied with the same, the present appellant – original accused no.1 has preferred this Criminal Appeal under Section 374 of the Criminal Procedure Code, 1973.

2. The short facts of the prosecution case are as under :

2.1 On 3.8.1996, Mr.Noormohammed Memon Vora was discharging his duty as P.S.O., Nadiad Rural Police Station. At that time, one person viz. Kanaksinh Udaysinh, resident of Dabhan, entered in the police station and narrated the incident in question informing the P.S.O., that he is staying at village Dabhan along with his brothers and doing agricultural activities and all brothers are married. He has also given details that his brother Jayesh @ Jayendrasinh has been married at Miyagam Karjan before four years and he has no child. It has been further informed by him that yesterday night, after taking supper he and his brothers along with their respective wives were

sleeping in their respective bed-rooms after watching the picture on T.V. He has further disclosed that early in the morning at about 6.00 a.m., his younger brother Jayendrasinh has informed him that his wife Sonal @ Laxmiben is not getting up and he has shown fear that she might have taken poison. Therefore, he went into the room of Jayendra along with mother Sajjanben and they had tried to wake her up but they found that she is no more. Therefore, according to him, he has informed his close relatives (fua – father's sister's husband Chhatrasinh Kalyansinh Mahida) and in turn he informed the parents of the deceased on telephone and thereafter, he declared the same before the P.S.O., Nadiad Rural Police Station. Therefore, P.S.O., recorded the same at about 12.45 hours and prepared a Vardhi note numbered as 14 of 1996 and entry to that effect has been made in the station dairy also.

2.2 Before he proceeds with the investigation, one lady namely Kamlaben Samatsinh has entered into the police station and filed a complaint. She has informed about the incident in question in detail. She has narrated that she is a resident of Miyagam Karjan. Her husband has expired since long and she is having four daughters. Out of them, younger daughter Laxmi @ Sonal had been married with Jayendrasinh Udaysinh Vaghela of Dabhan before 4 years and after marriage, she used to visit her parental home at village Karjan and complain about her husband Jayendrasinh of having illicit relations with another woman due to which she was being ill-treated. She has also informed that on that count even her two

mothers-in-law also used to ill-treat her.

2.3 It has also been specifically narrated by her that Laxmi had come to her house at Karjan before four months. She had complained during her stay about the ill-treatment meted out by her husband and two mothers-in-law. She has informed the same to relatives of her husband and in turn, all gathered there and there was compromise to the effect that the deceased Sonal @ Laxmiben would not be ill-treated and on that assurance, her husband Jayendrasinh had taken the deceased with him. On the day of incident, her husband's brother had received telephonic message of Sonal being serious and, therefore, she along with her relatives came to Dabhan and they found deceased Sonal lying dead in the house and foam had come out from her mouth and having strong smell of some poisonous medicines. Therefore, she came and narrated all to the police officer and in turn Nadiad Rural Police Station had recorded the same and registered the offence against the husband of said Laxmiben i.e. Jayendrasinh and her two mothers-in-law namely Sajjanba and Shardaba initially under Sections 306 and 498(A) of the Indian Penal Code as Nadiad Rural Police Station I C.R.No.134 of 1996 and investigation had been handed over to Head Constable Ataji Punjabhai of Nadiad Rural Police Station. He went to the scene of offence and prepared inquest panchanama in presence of panchas on 3.8.1996 itself between 15.30 and 16.30 hours. The deceased has been identified as Sonal @ Laxmiben Jayendrasinh Vaghela by the complainant – her mother Kamlaben Padhiyar. Thereafter, he has also prepared the panchanama of

scene of offence in presence of panchas as place of scene of offence has been shown by witness Kanaksinh Udaysinh Vaghela of Dabhan who is the brother of appellant – accused no.1. Thereafter, he has made arrangements to send the body of Laxmiben for postmortem along with police yadi and on receiving the same, the postmortem has been performed by the panel doctor of Civil Hospital, Nadiad. He has also collected the cloth worn by the victim at the time of incident and other muddammal and they were kept as muddammal after preparing panchanama to that effect. Thereafter, he has received the post-mortem note along with the primary report of the cause of death wherein panel doctors have opined that it is a case of strangulation and death was due to throttling but with a narration that final cause of death will be given on receipt of vicera report from expert.

2.4 Thereafter, further investigation has been taken over by P.S.I. - Chhatrasinh Shivsinh Chavda of Nadiad Rural Police Station. He has also recorded the statement of various witnesses and two other accused have been arrested. He has also seized letters written by one Nileshwari to accused no.1 in view of the telephonic message received by Kanaksinh – brother of accused no.1 in presence of panchas after following all formalities. Thereafter, he has recorded further statement of Shri Kanaksinh on 29.8.1996 and he also arrested one Nileshwari on 26.9.1996 in this offence as accused no. 4. Thereafter, he has sent the letter alleged to have been written by Nileshwari to hand-writing expert. He received the F.S.L. report wherein the Expert has

categorically opined that no poisonous drug has been found from the body of the deceased. Prior to that, he has received the post-mortem report from the panel doctor stating that it is a case of strangulation. As the postmortem finding revealed that the death was due to throttling, he has added Section 302 of Indian Penal Code and sent report to that effect to the Court. Thereafter, on completion of the investigation, he has submitted the charge sheet against all four accused in the Court.

2.5 As the offences alleged against the accused were exclusively triable by the Court of Sessions, learned J.M.F.C., Petlad has committed the case in the court of Sessions at Nadiad and on receiving the same, it has been numbered as Sessions Case No.13 of 1997. Thereafter, it has been transferred to the court of learned Additional Sessions Judge, Kheda at Nadiad.

2.6 Out of four accused, accused no.4 – Nileshwari had submitted one application exh.7 with her signature wherein she has categorically mentioned that the charge sheet paper does not disclose any offence against her for framing the charge. Therefore, she has requested to discharge her. Learned APP has made an undated endorsement of `seen' on the said application. The learned Sessions Judge has passed the following order on the same day:

> “Read. Heard. As there is no charge against No.4, she is hereby ordered to be discharged for want of any perfect evidence to frame charge. Therefore, to proceed against No.1,2

and 3.”

2.7 It is required to be noted that before passing the order, no opportunity has been given either to the prosecution or to the complainant who appeared through her advocate. Even no endorsement has been obtained from the advocate of the complainant. Even, no reasons have been assigned for discharging her forthwith. Thereafter, immediately the learned Judge framed the charge at exh.8 against accused nos.1, 2 and 3.

2.8 The accused have pleaded not guilty and prayed for trial. To prove the guilt against accused nos.1, 2 and 3, prosecution has examined in all 12 witnesses and also produced and placed reliance on various documentary evidence. On submission of closing purshis Exh.48 by learned APP, the learned Additional Sessions Judge has recorded further statement of all the three accused under Section 313 of the Criminal Procedure Code. Thereafter, after giving opportunity to the learned counsel for the respective parties, the learned Additional Sessions Judge delivered the judgment wherein as stated above, he has convicted the appellant – accused no.1 and acquitted the original accused nos. 2 and 3 which is giving rise to file the present appeal.

2.9 It is also required to be noted that against the acquittal of accused nos.2 and 3, State has not preferred any appeal.

3. Heard learned counsel Mr.A.D.Shah for the appellant and learned APP Mr.R.C.Kodekar, for the respondent – State.

4. Learned counsel for the appellant Mr.A.D.Shah has taken us through the various oral evidence viz. Evidence of P.W.9 - Kanaksinh Udaysinh, Exh.40 brother of accused no.1 and son of accused nos.2 and 3 who have informed the police regarding the incident first in time at about 12.30 p.m., for which he personally went to the police station and informed the P.S.O., Noormohammed Rehman Vohra - P.W.10 Exh.42 and P.S.O., has recorded the same as informed by said Kanaksinh and, thereafter, the same has been registered as AD No.14/96 and entry to that effect has been made in the station dairy.

5. He also took us through the oral evidence of P.W.6 - Kamlaben Samantsinh, Ex.37 who is the mother of deceased and also the complaint which has been filed after complaint of P.W.9 Kanaksinh Udaysinh and which has been registered by Head Constable - Atabhai Pujabhai P.W. 11 Exh.45 for the offences under Sections 498(A), 306 and 114 of Indian Penal Code against four persons i.e. Accused no.1 Jayendrasinh Udayasinh Vaghela – husband of deceased, no.2 Sajjanben wd/o Udaysinh Vaghela, No.3 Shardaben wd/o Udaysinh Vaghela and No.4 Nileshwari @ Dinku Kantilal Patel. He also took us through the oral evidence of P.W. 7 Jayendrasinh Samantsinh Exh.38 who is the brother of deceased Laxmiben and also through P.W.8 Natwarsinh Ramsinh Exh.39 uncle of deceased Laxmiben. It is required to be noted that all the three

witnesses i.e. P.W.6 complainant, P.W. 7 brother of deceased and no.8 Natwarsinh Ramsinh are not witnesses of incident, but they are the nearest relatives of the deceased who came to Dabhan on the same day at about 11.00 a.m., as per the telephonic information received by one Natwarsinh from the accused's side. Mainly, the evidence are on the point of cruelty. Over and above, Mr.Shah also took us through the oral evidence of P.W.10 Noormohammed Vora Head Constable - Exh.42 who has registered the A.D.entry no.14/96. According to him, through the above witness, prosecution has proved entry no.14/96.

6. He also took us through evidence of P.W.11 Head Constable - Atabhai Punjabhai who is the person to whom the investigation of A.D.Note No.14/96 has been handed over by the P.S.O. Over and above, he also took us through the oral evidence of P.W.2 - Dr.Dineshkumar Laljibhai Exh.17 who carried out the postmortem of deceased Laxmiben and proved the postmortem report exh.19. Simultaneously, he also took us through the oral evidence of P.W. 3 Dr.Jaswantbhai Pandya Exh.28 and according to prosecution, he is the doctor of Dabhan village who reached the house of accused and Laxmiben early in the morning at 7.00 as he has been called by them by informing that Laxmiben is serious. As per his evidence, when he entered the place of incident, he noticed that she is no more and there was strong smell of some poisonous medicine in the room. As it appeared to him to be a case of suicide, he told to the family members of the deceased to inform the same to the police.

7. Learned counsel Mr.Shah also took us through the oral evidence P.W. 12 Chatrasinh Chavda P.S.I., who has taken over the investigation from Head Constable - Atabhai on 3.8.96 and the person who has investigated the matter further and submitted the charge sheet also. It also reflects from his evidence and from the record that initially the offence has been registered as A.D.Note no.14/96. Thereafter, after the period of 1 ½ hours, offence under Section 498-A, 306 and 114 of Indian Penal Code has been registered in view of the complaint given by complainant Kamlaben – mother of the deceased on 3.8.96 at about 14.10 hrs.

8. After taking us through the above referred oral evidence and also documentary evidence which are on record as well as the reasoned judgment, learned counsel for the appellant Mr.Shah has mainly contended that the prosecution case is based only on the circumstantial evidence as there are no eye witnesses. There is no direct or indirect evidence to connect the appellant – accused no.1 with the crime in question. It has also been argued by him that prosecution has failed to prove that on the day of the incident at night, accused no.1 was with the deceased in her bed-room. In this regard, he took us through the oral evidence of Kanaksinh – brother of accused appellant no.1 and argued that he has not supported the say of the prosecution. He even did not support his own version narrated at the earliest before the P.S.O., Noormohammed who has registered AD note no.14/96 on the basis of information given by

him.

9. It has also been argued that as he has not supported the say of the prosecution, previous AD note can be treated as his statement under Section 161 of Cr.P.C., and when he has not supported the version of the prosecution and has been declared as hostile, the Court cannot rely upon his statement and convict the accused on that basis. At the most, the same can be used against him for the purpose of contradicting him. Taking us through the oral evidence of Noormohanned, it has been argued that though prosecution has tried to prove the same, according to him, it is not the evidence which is required to be taken into consideration against the appellant – accused.

10. It has also been further argued that except this, there are no other evidence to connect the appellant – accused with the crime in question and prosecution has failed to prove that on the day of the incident, appellant was with the deceased at night in her bed-room. Once it has been established that he was not there, then the conviction on that basis is required to be reconsidered.

11. It has also been argued by him that prosecution has failed to prove the illicit relation the accused no.1 had with another girl Nileshwari. It is argued that the prosecution has not proved the letter alleged to have been written by Nileshwari. He also took us through the relevant evidence to that effect and argued that specimen handwriting of

Nileshwari has been taken by Investigating Officer and has been sent along with alleged letter which has been seized by Investigating Officer at the instance of Kanaksinh, brother of appellant no.1, to the handwriting expert and the report which has been received by the prosecution has not come on record. In this regard, he took us through the oral evidence of P.S.I.,Mr.Chavda and argued that even as per the say of Mr.Chavda, same has been handed over to learned APP, Mr.Patel, and Mr.Patel has not produced the same. In view of the above, the above referred finding does not have any basis. He also took us through the evidence of panch witness Ishwarbhai Patel Exh.29 P.W.4 and argued that he is the panch in whose presence and the presence of other panchas the letters alleged to have been written by the original accused no.4 Nileshwari and accused no.1 have been seized at the instance of Kanaksinh from the house of accused and same has been proved through him.

12. It has been argued that at the most, only panchanama can be proved by way of above witness because there is no evidence to the effect that he knew the handwriting of either the original accused no.4 or deceased nor he had any opportunity to see their writing. The Court has exhibited the same. However, the same ought not to have been looked into by the Court below. Hence, the prosecution has failed to establish that Nileshwari had any relation or illicit relations with original accused no.1 and they used to write letters to each other. It has been argued that the deceased died due to asphyxia due to throttling. It cannot be done in absence of evidence

that at the time of incident or at that night, deceased was with the accused. It can however be presumed that somebody must have done the same.

13. He further argued that the other family members are also staying in the above referred house though separately in an independent room. Lastly, it has been argued that in absence of any evidence to connect appellant no.1 with the crime in question, the conclusions arrived at by the Court below that it was accused no.1, who was only responsible for committing the murder of the deceased and that accused no.1 was also responsible for ill-treatment, are not on the basis of any evidence and, therefore, the impugned judgment is required to be quashed and the sentence awarded by the Court below on that basis is required to be set aside.

14. He has also argued that the benefit of presumption of Section 113(A) of Evidence Act will not be available in the case to the prosecution for the purpose of proving the murder.

15. Learned APP for the State Mr.Kodekar has vehemently argued on the basis of the evidence upon which the reliance has been placed and which has been shown to us by the learned counsel for the appellant. He has emphasized on the evidence of Kanaksinh Udaysinh P.W.9 Exh.40 along with P.W.10 Noormohanned Vohra Head Constable Exh.42 who has registered the A.D.Note entry nos.14/96 and evidence of P.W.11 Atabhai Punjabhai exh.45 to whom investigation of entry no.14 of 1996 has been handed over. He also

took us through the oral evidence of P.W. 12 Chavda P.S.I. Exh.47, Kamlaben P.W. 6 Exh.37, P.W.Nos.7 and 8 i.e. Jayendrasinh Samantsinh and Natwarsinh Ramsinh brother and uncle respectively of deceased, Dr.Jaswantbhai Pandya P.W.3 Exh.28 and documentary evidence such as complaint exh.46, inquest panchanama exh.21, scene of offence exh.22, FSL report exhs.25 to 27, p.m.note exh.19, death certificate exh.20, and also A.D.entry. It has been argued that it is Kanaksinh P.W. 9 exh.40, who went to the police station at about 12.30 and declared the offences and same has been registered as A.D.no.14/96 and same has been signed by him and shown by P.S.O., Noormohammed, P.W.10 Exh.42 who has registered the above referred information and, in turn, it has been registered as entry no.14/96 by P.S.I. Mr.Chavda P.W.12 exh.47.

16. After taking us through the oral evidence of both the witnesses, it has been argued that the prosecution is able to prove the presence of appellant – accused no.1 at night of the day of the incident at his residence. It has been argued that the same also is supported by oral evidence of Dr.Pandya exh.28. According to him, the married life of the deceased was only four years and the prosecution is able to prove that the incident must have taken place at midnight for which he placed reliance upon the post-mortem note exh.19 showing that food particles were found in the stomach and so according to him death must have been taken after 4-5 hours of meal. It has been argued that the written explanation under Section 313 that daily he used to go to his field at night for the purpose of providing

water to the crop is not believable. According to him, all the three brothers are staying in one building where separate bed-rooms have been provided to them. It has also been argued that Court below has also narrated various circumstances thereby a chain has been established beyond reasonable doubt. According to him, accused no.1 was with the deceased at night and she has been killed which reflects from the post-mortem note and also from the opinion of the doctor. However, from the very beginning, Kanaksinh has tried to mislead the investigating agency by informing in a wrong direction. Even if we believe the story of Dr.J.Pandya P.W. 3 exh.28 and others, then also, it can be said that after the brutal murder, they have tried to brush up the same by way of sprinkling poisonous medicine in the room so as to mislead the investigating agency. They have informed the same to the police to that effect and hence, obviously when the police came, smell of poisonous medicine was there and, therefore, obviously parents may also feel that it is a case of suicide keeping in mind the previous relation of appellant no.1 with his wife for which the detailed account has been given by the mother, brother and uncle and, therefore, they have informed the police accordingly and offence has been registered under Section 498(A) and 306 of the Indian Penal Code.

17. Learned counsel for the appellant as well as learned APP have also placed reliance upon various judgments. We have gone through the same and summarized the same hereinbelow.

R. RAJENDRA NAIR V/S. STATE OF KERALA, reported in AIR 1998 SC 1.

Penal Code (45 of 1860), S.300 - MURDER - EVIDENCE - Murder - Circumstantial evidence - Allegations that accused assaulted deceased-wife till she became unconscious and thereafter left his house and came back and hanged her - Presence of accused in his house when hanging took place not proved - Defence version that accused along with his daughter returned home and found her hanging - No evidence to prove that deceased was alive when accused returned home - Prosecution story of hanging doubtful in absence of evidence that deceased continued to remain unconscious till she was allegedly strangulated - No evidence also to support story of electrocution falsely circulated by accused - Circumstance not pointing out towards guilt of accused - Conviction of accused, set aside.

STATE OF WEST BENGAL V/S. VINDU LACHMANDAS SAKHARANI @ DERU, reported in AIR 1994 SC 772

PARA – 2. We have heard learned counsel for the parties. There is no direct evidence in this case. The prosecution relied upon various circumstances to prove the involvement of the respondent as well as her husband in the case. The High Court has examined each of the circumstances in detail and has come to the conclusion that the case against the respondent was not proved beyond reasonable doubt. We see no ground to differ with the reasoning and the conclusions reached by the High Court.

PARA - 4. We see force in the argument advanced by the learned counsel. Both husband and wife were charged with an offence u/S. 302 read with S. 34, IPC. The charge which was based on the common intention of the two failed with the acquittal of the husband and there being no charge u/S. 302 simpliciter against the wife she could not be convicted. In any case there is no evidence on the record to show that she independently committed the offence.

VIJENDER ETC. V/S. THE STATE OF DELHI, reported in JT 1997 (3) SC 131

Equally unsustainable is the trial Judge's reliance upon the statement made by Jeetu (P.W.2) before the police in view of the express bar of Section 162 Cr.P.C., which we have discussed earlier. Indeed, we find, the trial judge placed strong reliance on the purported statement made by Jitender before the police that they (the appellants, were hiding and that they were involved in kidnapping and murder of Khurshid to convict them.

SUBIMAL SARKAR V/S. SACHINDRA NATH MANDAL & ORS., reported in JT 2003 (1) SC 72

We are in agreement with the finding of the High Court. It is true that the prosecution has been able to establish motive but then that by itself is not sufficient to base a conviction. The other circumstantial evidence that is established beyond reasonable doubt is the fact that the deceased died of strangulation. There is no material produced by the prosecution to show who actually committed this crime but there being no eye-witnesses to the incident the prosecution will have to establish all the links in the chain of circumstances which would have to show that in all probability it is only the accused persons who could have committed this crime. This the prosecution has failed to establish. IT is an admitted fact that apart from the accused persons there were others also staying in the house of A-1 which included the husband of the deceased. No case is made out by the prosecution why others including the husband could not have been a partly to this crime. In the absence of any such material, the trial could relied on a statement made in section 313 Cr.P.C. by A-3 which the trial could construed as a confession. We have carefully examined this statement of A-3 wherein he had stated that when he came to know that the deceased had swallowed poison he went to the

room where the deceased was and found her husband Nakul pressing her neck. With a view to prevent the poison from going down the throat at this stage, A-3 put his fingers in the throat of the deceased to make her vomit the poison. In the said process, he injured his fingers. This statement, if it is to be accepted in its entirety, shows it was the husband of the deceased who pressed the throat which could have caused the suffocation. The role of A-3 as stated in the statement does not implicate A-3 of having been a party to any crime but the trial court thought otherwise. In this regard, we agree with the High Court that this statement cannot be made use of by the prosecution to prove the guilty of the deceased.

STATE OF PUNJAB V/S. HARI KISHAN & ORS., reported in JT 1997 (8) SC 250

SECTIONS 302, 201 – Acquittal of respondent 1 of charges under section 302, 201 and of Respondent 1 and 3 of charges under section 201 by High Court reversing judgment of trial court – Held that even considering death by strangulation in the house of respondents and also possible motive of Respondent 1, no evidence was led by prosecution to reject the explanation given by Respondent 1 in his examination under Section 313 Criminal Procedure Code – Evidence led by prosecution held not sufficient to convict Respondent 2 and 3 under section 201 Indian Penal Code – Appeal Allowed.

Though it is a fact that Jai Rani died as a result of strangulation and that too in the house of the respondents and that does create a strong suspicion that her death was caused by someone residing in the house and in all probability by R-1 as he had some motive to do so, it is not possible to convict him as the evidence led by the prosecution is not conclusive and no evidence was led by the prosecution on the basis of which it can be said that the explanation given by him in his examination under Section 313, Cr.P.C., is not probable. The evidence led by the prosecution against R-2 and R-3 is also not sufficient to

warrant their conviction under Section 201 IPC.

P. MANI V/S. STATE OF TAMIL NADU, reported in JT 2006 (2) SC 607.

In the present case where the appellant has been charged under Section 302 of the Indian Penal Code, the presumption in terms of Section 113A of the Evidence Act is not available. In absence of such a prosecution, the convict and sentence of the accused must be based on cogent and reliable evidence brought on record by the prosecution. In this case, we find that the evidences are not such which point out only to the guilt of the accused.

BALDEV SINGH V/S. STATE OF PUNJAB, reported in AIR 1991 SC 31

Criminal P.C. (2 of 1974), S.154, S.161 and S.162 - WITNESS - FIR - Statement of accused under S. 161 is not substantial piece of evidence - Evidence of witness supporting prosecution in chief examination - Witness in cross-examination stating that he could not identify accused due to darkness - In statement before police witness not stating that he could not identity accused due to darkness - Accused cannot be convicted on basis of statement before police.

HARKIRAT SINGH V/S. STATE OF PUNJAB, reported in AIR 1997 SC 3231

Criminal P.C. (2 of 1974), S.154 – FIR – Death of person lodging FIR – Contents of FIR – Could be used for purpose of corroborating or contradicting person lodging FIR if he had been examined but not as substantive piece of evidence.

ANDREWS S/O. JACOBV/S. STATE OF KERALA, reported in 2005 (10) SCC 126

Criminal Procedure Code, 1973 – S.154 – FIR – Held, can be utilised for the purpose of corroborating or contradicting only the maker thereof – FIR cannot be used to discredit testimony of any other person – FIR lodged by PW 1 who was not an eyewitness – Testimony of PW 3, the eyewitness, held, cannot be discredited for any statement made in the FIR – There was nothing in the cross-examination of PW 3 to impeach his testimony, which also received corroboration from PW 2 – Held, courts below were therefore, justified in relying upon the testimony of PW 3 to come to the conclusion that the prosecution case had been proved beyond reasonable doubt – Therefore, appellant's conviction under S.302 upheld – Evidence Act, 1972, Ss.145 and 157 – Penal Code, 1860, S.302

MOTI SINGH AND ANOTHER V/S. THE STATE OF UTTAR PRADESH, reported in AIR 1694 SC 900.

PARA - 4. All the eye-witnesses of the incident deposed in practically identical terms about the progress of the incident in which it was alleged that the members of the accused party fired with guns and pistols both from inside and outside the room on one side of the passage and also from the seori (cattle shed) on the other side of the passage when the victim party passed along the passage. The High Court felt doubtful about the firing of the shots, from the cattle shed, and consequently acquitted Sheo Shankar Jagjiwan and Shankar Dayal who were said to be mainly the persons who had fired from that place.

PARA – 5. The High Court, however, believed the prosecution version of the firing from the room and later from the platform. It appears that the High Court believed this version because the prosecution witnesses stated so and because the statements exhibits Kha 5, Kha 8 and Kha 75 mentioned about the shots being fired from those places. Statement Ex. Kha 75 does not say so. It says that firing took place from the front and that these people fired shots with guns. Statements

Exs. Kha 5 and Kha 8 were made by Ram Shankar and Jageshwar, who were examined as Court-witnesses 1 and 2 respectively. Ram Shankar and Jageshwar have been disbelieved by the Sessions Judge and it appears that the High Court did not take any more favourable view of their deposition in Court. It however seems to have relied on their statement, Exs. Kha 5 and Kha 8 respectively, recorded by a Magistrate at the hospital. In this it was in error. Those statements could have been used only in either corroborating or contradicting the statements of these witnesses in Court. If those witnesses were not to be believed their previous statements could not be used as independent evidence in support of the other prosecution evidence.

MR.R.C.KODEKAR – LEARNED APP FOR RESPONDENT-STATE

BABU S/O RAVEENDRAN V/S. BABU S/O BAHULEYAN AND ANOTHER, reported in 2003 (7) SC 37

C. Penal Code, 1860 – S.302 – Circumstantial evidence – Last seen together – Circumstances leading to the death of the deceased – Onus to give explanation in respect of – Where the accused husband and his wife slept together inside a bolted room on the night of occurrence, held on facts, it was for the accused alone to explain as to what happened and how his wife died on account of strangulation – Evident Act, 1872, S.106.

D. Criminal Trial – Appreciation of evidence – Generally – Truthfulness of witness – Held, is always in the court - Truthfulness of witness is elicited from the cross-examination – Witness PW 6, father of accused husband, tried to save him in his statement under Ss.161 and 164 CrPC – On facts held, truth elicited during cross-examination of PW 6 in court – High Court erred in holding that PW 6 committed a mistake while making statement during his cross-examination – Evidence Act, 19\872, S.137.

18. Keeping in mind the above referred arguments advanced by the learned counsel for the respective parties and also keeping in mind the oral as well as documentary evidence shown by them and reasoned judgment delivered by the Court below together with law laid down by the Apex Court relied upon by the learned counsel for the respective parties, we have evaluated the evidence on record and we proceed further.

19. It is required to be noted that as far as death is concerned, it is not the case of anybody that it is a case of natural death or a suicidal death. Therefore, no much concentration is required to be given to the above aspect of the matter. Not only that the evidence on record also shows that it is a homicidal death which reflects from the medical evidence and the post-mortem note and from the opinion of the doctor who has performed the post-mortem note and also on the basis of external and internal injuries which deceased have received. In short, it is not in dispute that it is not a death of homicide. Then question remains whether the accused is involved in the crime in question and for that we have discussed above from which following facts have been proved.

20. The appellant no.1 is the husband of victim Laxmiben, span of married life was of 4 years and age of victim was 23 years at the time of incident. In short, they were husband and wife and stayed together in the matrimonial home. It is also not in dispute or we can say it has been proved beyond reasonable doubt that the place of scene of offence is bed-room of

accused no.1 and the victim. It is also established from the evidence on record, documentary as well as oral evidence, that incident has taken place at about midnight which proved even from the opinion of the doctor who has performed the post-mortem also that semi digest food has been found. So it can be said that she must have taken food prior to 4-5 hours of the incident. As is established from the record that it was mid-night and therefore, generally the presence of the husband and wife would be in their matrimonial home and more particularly, in their bed-room. Not only that, Chhatrasinh, who is the husband of appellant no.1's father's sister, has informed the parents of the victim to that effect. Even the doctor who has been called for from the village informing him that Laxmiben is serious has visited the scene of offence which was also bed-room of the accused and the victim. It also reflects from his evidence that when he reached there, appellant no.1 was there.

21. We have gone through the evidence of Dr.Jaswantbhai Trambakprasad Pandya P.W. 3 Ex.28, wherein he has categorically deposed the same. He deposed that when he reached there, Jayendrasinh i.e., appellant no.1 and other accused was also present and the victim were lying there in the bed-room on the floor. It has also been deposed that at that time there was smell of poisonous medicine from the said room. There was no cross-examination on the line that when he reached there, Jayendrasinh was not there. So the deposition of Dr.Pandya has remained unchallenged on this point. Simultaneously, even P.W.10, Noormohammed Rehman Vora Exh.42, who was

discharging his duties as P.S.O. in Nadiad Rural Police Station at the relevant time i.e. 3.8.96, has deposed that at 12.45.p.m., Kanaksinh Udaysinh resident of Dabhan came to Nadiad Rural Police Station and he recorded the unnatural incident of his brother's wife has been noted down by Noormohammed Vora in the language in which it has been narrated by Kanaksinh and he has also taken his signature. As it has been reflected from the say of Kanaksinh, that it is a suicidal death, he registered the same as A.D.Note no.14/96. He has handed over the investigation to Atabhai Punjabhai, Head Constable. It is also required to be noted that the information has been noted down by him in the station dairy and at the time of his deposition, it has been exhibited as Exh.43.

22. It also reflects in his oral evidence, more particularly, in chief-examination that same has been exhibited with consent of all concerned i.e. Prosecution as well as advocate of the defence side. Not only that, the advocate of appellant – accused no.1 has not even cross-examined him on any point. In short, qua appellant no.1, it has remained unchallenged. So, exh.43 and exh.44 are the relevant documents which have been exhibited with consent. There was no cross-examination on this line by the learned counsel for the appellant – accused. But along with this, the evidence of P.W. 9 Kanaksinh Udaysinh Exh.40 is also required to be kept in mind who is the elder brother of appellant no.1 and according to him, he went to Nadiad Rural Police Station, wherein he has informed the fact which has

been noted down by the P.S.O., of Nadiad Rural Police Station Exh.43. He has been examined and upto certain extent, he has supported the say of the prosecution but he has not supported in the chief-examination regarding the presence of his brother i.e. Appellant no.1. He has also stated in the chief-examination itself that he went to the police station as suggested by his relative Chatursinh and he has informed the police accordingly. Upto that extent, he remained with the say of the prosecution.

23. Thereafter, he has changed his version to a limited point that his brother was not there during previous night but he was in his field. So he has been declared hostile at the request of learned APP. He is cross-examined by the learned APP wherein specific question has been asked to him regarding the say which he has said before the P.S.O., and same has been noted down and he has signed the same. Of course, he has not supported but denied. He has tried to help his brother in his cross-examination by the learned advocate for appellant – original accused no.1 and he has made effort to take his brother away from the scene of incident.

24. But P.S.O., who has been examined by the Court below as P.W.10 Exh.42, has categorically deposed the fact which he has noted down as per the say of Kanaksinh. So the prosecution is able to prove all the contradictions regarding the same.

25. Much emphasis has been given by the learned counsel for the appellant on this point mainly on the

ground that Kanaksinh has not supported the say of the prosecution on the material point and is declared as hostile and, therefore, according to him, his whole evidence is required to be discarded and in absence of his evidence, there is nothing on record to connect the accused no.1 in the crime in question. He has also argued and placed reliance on some judgments for Section 161 of Criminal Procedure Code that Court cannot convict the appellant – accused on the ground of statement under Section 161. Showing the same it has been argued that as Kanaksinh has not supported his own version, except his previous statement and the station dairy in earliest version which he has narrated before P.S.O., and noted down and exhibited, which is a statement under Section 161 there is nothing on record against him.

26. We have also gone through the above referred judgments and we also agree that Section 161 statement cannot be made as a base for conviction. Here in this case, according to us, the Court below has not placed reliance upon Section 161 statement of Kanaksinh. We also make it clear that presence of the appellant – accused has been established. Facts which have been established beyond any reasonable doubt are that when Kanaksinh, who is admittedly the elder brother of appellant no.1 went to the police station at 12.45, narrated all these things and the same has been reduced in writing in his own handwriting which he has signed and A.D.No.14/96 has been registered and same has been proved. So it cannot be said that it is a statement under Section 161 of Criminal Procedure Code. Not only that, obviously he has

pressure and therefore he may try to save his brother or will try to see that his brother should be taken away from the scene of offence so he can be easily saved. But there are other evidence on record which connect him with the crime in question viz., the independent evidence of Dr.Pandya. As we have discussed earlier, he has categorically deposed before the Court that when he went there, appellant no.1 was at his residence and he is the independent witness and has nothing to do with anybody. Not only that, they failed to discharge their duties by not informing the police till 12.45 hrs., that specific admission has been given by Dr.Pandya to the family members including the present appellant to inform the police mainly on the ground that when Dr.Pandya reached there in the morning, he had found strong medicine poisonous smell in the morning and according to him, it was a medico-legal case.

27. It reflects from the evidence and arguments advanced by learned counsel for the respective parties that the dead body of Laxmiben has been received by the doctor for performing the postmortem on 3.8.96 at about 6.00 p.m. They started the postmortem on 4.8.96 at about 6.30 a.m., and completed the same at about 8.00 a.m., which reflects from the p.m.note exh.19. It is also required to be noted that external marks of injury found by the doctor on the body of Laxmiben have been noted down by them at col.no.17 of postmortem report exh.19 and they have given probable cause of death which reflects in col.no.23 of postmortem note exh.19 which reads as under :

> “Probable cause of death is due to asphyxia due to throttaling.”

28. The record shows that upon receipt of FSL report, they made an endorsement to that effect upon postmortem note exh.19 below col.no.23 which reads as under :

> “Poison is not found in vicera.”

Thereafter, they have given final opinion on cause of death on 25.10.96 which reads as under.

> “Final Cause of death is due to asphyxia due to throttaling.”

29. On that basis, I.O.Shri Chavda has submitted the application in the Court below on 22.10.96 requesting to add Section 302 of Indian Penal Code in view of the report of final cause received by him from the panel doctor. Thereafter, the charge sheet has been submitted by him on 31.10.96. It is required to be noted that thereafter, fresh warrant has been issued by learned JMFC against all accused and except accused no.1, all the three accused have been released on bail by the Court.

30. On 26.2.97 all the four accused have presented themselves before the learned Additional Sessions Judge and before he proceeded further under Section 328 of Cr.P.C., accused no.4 Nileshwari @ Dinku has submitted the application exh.7 wherein she

has only mentioned that if whole charge sheet is accepted, then also there is no evidence to connect her with the crime in question and, therefore, she has prayed for discharging her under Section 227 of Cr.P.C., which shows that it has been signed by her and learned APP has only made an endorsement to the effect that “seen” on the same day and, therefore, the learned Judge has passed one line order and she has been discharged which also reflects from further proceedings which have been taken place on the same day. Thereafter, immediately he has framed the charge against three accused i.e., present appellant – original accused no.1 and two mothers-in-law of the deceased - accused nos.2 and 3 at Exh.8.

31. We have the evidence on record along with the finding given by the Court below. We are of the opinion that it is a clear-cut case of brutal murder of a young lady aged about 23 years who just entered into her matrimonial life with lot of dreams and before she had anything in the life, she has been killed by her own husband. It has been proved that same has been said by appellant no.1 to his family members including Kanaksinh and they did not inform the police for a considerable time. Not only that, though it was a homicidal death, they have tried to make a show that it was suicidal death and for that, even poisonous substance has been thrown in the room as well as on the body of the deceased just to mislead the investigating agency and public at large and hence one can say they are able to succeed upto certain level. Even mother, brother and uncle of the victim came from different villages. They have seen

the same and felt smell etc., and they also were misled. They went to the police station and informed the police accordingly and, therefore, initially offence under Section 498-A, 306 and 114 of Indian Penal Code was registered. So role of Kanaksinh is such that though it was a planned cold blooded murder, they remained active and tried to mislead all concerned and they successfully done it. Ultimately, it has been revealed from the opinion of the doctor who has performed the post-mortem that it is not a case of suicide but is a case of murder and ultimately Section 302 of Indian Penal Code has been added and trial was completed.

32. It is also required to be noted that it is a case of circumstantial evidence and hence, obviously, when the incident has taken place at midnight in the house of victim and appellant no.1, who are husband and wife, admittedly they would be there in the bed-room and there would not be any scope any eye witness to the incident and, therefore, obviously, case is required to be dealt with on the basis of circumstantial evidence. The Court below has narrated the circumstances. We have gone through the same. We also confirm the same along with the evidence on record which has been shown to us by learned counsel for the accused and learned APP Mr.Kodekar. When a young lady is killed at her matrimonial home, neighbours who are admittedly the relatives of the appellant will never support the say of the prosecution. In these circumstances, Court has to evaluate the evidence keeping in mind all aspects of the matter. We have also done the same keeping in

mind all these things. We are of the opinion that it is a case of cold blooded murder wherein involvement of the present appellant has been established beyond reasonable doubt and we can say it is a case of last seen together. However, meaning of the word last seen together in these types of cases from other cases of incidents taking place in public place or somewhere else that while going or coming. Here in this case, last seen together means lastly they both were there in the room.

33. Therefore, it is his duty to explain as to what happened to her. However, he has not come out with any satisfactory explanation. It is true that in his further written statement, one line has been mentioned by him that at night when the incident has taken place, he was not at home but was in his field.

34. We have gone through the same wherein he has categorically said that everyday, he used to go to his field. There are evidence on record that they are three brothers and the say of the appellant that he is the only person who every day used to go to the field for that purpose is not believable. Not only that, in his statement under Section 313 of the Criminal Procedure Code, he has not chosen even to enter in the witness box though opportunity was given. Not only that they have not examined any witness if at all they were keen about it but in a written statement, it has been stated firstly, we have tried to see it from the record but we could not find it but in Misc.File, we found one written statement. We have gone through it without entering

into technicality but we are not satisfied with the same but the facts that there are evidence on record wherein it has been established from the oral evidence of all the relatives of the victim regarding mental and physical cruelty by them to her. Thereafter, she has been killed. So we can say that the some dispute was going on and ultimately she has been killed within a span of 4 years and keeping in mind the evidence of doctor and other evidences, we are of the opinion that appellant was there in his matrimonial home along with his wife at night and she has been killed there. Once, it has been established then burden will be shifted on the accused but they have failed. In view of the above, we do not interfere with the judgment and order of conviction passed by the Court below. This appeal is, therefore, required to be dismissed.

Accordingly, this appeal is dismissed.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

srilatha